



Kentucky Law Journal

Volume 42 | Issue 1

Article 9

1953

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Recommended Citation

Youngblood, James T. (1953) "The Theories of Joint Bank Accounts," *Kentucky Law Journal*: Vol. 42 : Iss. 1 , Article 9.
Available at: <https://uknowledge.uky.edu/klj/vol42/iss1/9>

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raising the level of the officer by an enforced system of education, or by paying the officer a higher salary? Both remedies would seem desirable, but whatever the solution, attention should be given to the problem, and the situation should be re-examined from time to time.

CHARLES R. HAMM

THE THEORIES OF JOINT BANK ACCOUNTS

The purpose of this note is to discuss the various theories by which the courts give effect to the intention with which a deposit in a joint account is made where one person contributes the entire amount deposited and expressly provides for the right of survivorship. The cases suggest three principal theories which will be examined. Some courts sustain the account on the theory that a joint tenancy with survivorship is created by a gift *inter vivos*, while others rely on the notion that the deposit results in a third party beneficiary type contract with the bank. A third group base the validity of these deposits on statutory provisions which explicitly authorize the deposit or raise a presumption in favor of its validity. The discussion will be confined to the rights created between the joint depositors since the rights and liabilities of the bank normally are prescribed by statute and present no substantial problem.¹

GIFT THEORY

Those jurisdictions which classify the joint account as a gift creating joint ownership, require that two essential elements of a valid gift *inter vivos* be present: an adequate manifestation of donative intent, and a delivery.² They do not require a *manual* delivery of possession to the donee, however, since this is impossible in this type of transaction. The physical act of depositing money under this theory amounts to a delivery to the bank for the donee and is sufficient. Neither is it required that the donor relinquish complete control of the subject matter by creating exclusive control in the donee. Since a surrender of complete control would deny the donor-depositor the right to withdraw money from the account, the cases hold that the delivery requirement is met if there is an adequate manifestation of intention to relinquish exclusive control.³ In other words, the creation of joint con-

¹ For a compilation of statutes, see note, 9 CORNELL L. Q. 48, 49 n. 6 (1923).

² *Bachmann v. Reardon*, 138 Conn. 665, 88 A. 2d 391 (1952). For additional cases on this theory see annotation, 149 A. L. R. 879, 880 (1944).

³ *Wilt v. Brokaw*, 196 F. 2d 69 (7th Cir. 1952).

trol over the money is an adequate surrender of control in the joint account type of gift and may be effected without a formal delivery to the donee, either actual or symbolic.

It is essential under this theory that the donor manifest an intention to create a present interest in the donee, because otherwise the transfer of ownership would be testamentary.⁴ The written form of the deposit is evidence of this intention, but apparently it may be supplemented by evidence as to what was said by the donor at the time of the deposit and also by what he does thereafter. Some courts seem to take the position that the deposit form evidences both an intention to create a present gift and to create a gift in the future,⁵ and therefore the form of the deposit is not conclusive as to the non-testamentary character of the deposit.⁶ The fallacy in this reasoning is that the courts view the donor's intention with the advantage of hindsight. Because the issue in litigation arises between the donee and the donor's estate after his death and because the donee made no withdrawals from the account during the lifetime of the donor, the conclusion is drawn that the donor intended for the gift to take effect at his death.⁷ From the viewpoint of the parties at the time of the deposit the actual question as to intention should be: Did the donee have the right to make withdrawals during the lifetime of the depositor? Undoubtedly the answer to this question must be *yes*, or the deposit serves no purpose whatsoever. If he can make withdrawals, then certainly he has a present interest. Some courts hold, nevertheless, that although the donee can make withdrawals from the creation of the account, he has no present interest because his withdrawals are made for the convenience of the depositor.⁸ If the donor-depositor only intended that withdrawals by the donee be for his convenience, he certainly could have adopted a more advantageous method for achieving this purpose such as giving the donee a power of attorney. Conceding that the depositor's manifestation of intention should be the controlling factor, it would seem that the *best* evidence of the intention of the parties is what they have reduced to writing, particularly in view of the rule against varying the terms of a written instrument by parol or extrinsic evidence.⁹

⁴ *Murray v. Gadsden*, 197 F. 2d 194 (D. C. Cir. 1952); see 38 C. J. S. 835 (1943).

⁵ *Bachmann v. Reardon*, 138 Conn. 665, 88 A. 2d 391 (1952).

⁶ *Brown v. Navarre*, 64 Ariz. 262, 169 P. 2d 85 (1946).

⁷ *Phoenix Title and Trust Co. v. King*, 58 Ariz. 477, 121 P. 2d 429 (1942).

⁸ *Murray v. Gadsden*, 197 F. 2d 194 (D. C. Cir. 1952).

⁹ One type of agreement ordinarily used in a joint bank account:

CONTRACT THEORY

Typical of the cases relying on the contract theory is *Hill v. Haven*,¹⁰ where the deceased converted his bank account into a joint account in the name of himself and his wife, and each signed the routine signature card. The court held that the agreement of the bank to pay to either of them or the survivor, any part or all of the money was conclusive. Under this theory intention is still the controlling factor, but the rights of the parties are contractual and no rationalization based on joint ownership is necessary. There is also no problem as to the testamentary character of the transaction. Where the parties have expressed their intention in the written agreement in clear and definite terms the contract cannot be varied or altered by parol evidence.¹¹ The agreement must be signed by both parties in order to create the joint bank account. Fraud, undue influence, or alterations may be shown by oral testimony as in any other writing. Absence of consideration may create some reluctance to follow this theory, but this objection can be overcome easily by conceiving of the contract as a third party beneficiary type. Thus, in consideration of the deposit the bank agrees with the contracting depositor that it will pay

Joint Account—Payable to either or survivor

We agree and declare that all funds now, or hereafter deposited to this account are, and shall be, our joint property and owned by us as joint tenants with right of survivorship, and not as tenants in common, and upon the death of either of us any balance in said account shall become the absolute property of the survivor. The entire account or any part thereof may be withdrawn by, or upon the order of, either of us or the survivor. It is especially agreed that withdrawals of funds of the survivor shall be binding upon us and our heirs, legatees, assigns and personal representatives.

SIGNED John Doe

SIGNED Richard Roe

If this is not a clear manifestation of intention it would be hard to visualize what would be.

¹⁰ 242 Iowa 920, 48 N.W. 2d 870 (1952). In the case of *Bishop v. Bishop*, 293 Ky. 652, 170 S.W. 2d 1 (1942) the Court of Appeals decided the joint deposit created a contract by saying, "Since the question is one of first impression, we have decided to uphold the right of Mrs. Bishop to the remainder of the joint account upon the contract theory. Especially do we believe this to be proper when we consider the facts that Mr. and Mrs. Bishop went to the bank and discussed with the cashier what they desired to do; that both of them placed all the money they then had in the bank in the joint account; and the arrangement was agreed to by and between the Bishops and the bank cashier. Clearly, rights were established which could not have been brushed aside by the acts of one of the parties even though the agreement would have permitted either of the Bishops to withdraw all of the money from the account."

¹¹ *Hill v. Haven*, 242 Iowa 920, 48 N.W. 2d 870 (1952); *First Security Bank of Utah v. Burgi*, 251 P. 2d 297 (Utah, 1952). See notes 103 A. L. R. 1123, 1140 (1936), 149 A. L. R. 879, 897 (1944).

the money to the depositor, the co-depositor (donee beneficiary), or to the survivor of them. The legal relationship arising is purely that of creditor-debtor, and no problem of revocability is raised since any withdrawal is merely a compliance with the terms of the agreement.

STATUTORY THEORY

The New York statute illustrates how the joint bank account may be sustained without direct resort to common law principals of gift theory or the contract theory. It provides:

When a deposit shall be made by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them, such deposit and any additions thereto made by either of such persons after the making thereof shall become the property of such persons as joint tenants, and, together with all dividends created thereon, shall be held for the exclusive use of such persons and may be paid to either during the lifetime of both or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to the savings bank for all payments made on account of such deposit prior to the receipt by the savings bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such a form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either the savings bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the addition thereto in such survivor.¹²

In the case of *Moskowitz v. Marrow*,¹³ it was held that this statute raises a rebuttable presumption that a joint tenancy with survivorship is created by the deposit, and after the death of one depositor the presumption is conclusive. However, as to withdrawals totaling more than half of the original deposit during the lifetime of both depositors, the presumption of joint tenancy may be overcome by competent evidence.¹⁴ A similar approach has been used in California under an identical statute.¹⁵ In the recent Michigan case of *Betker v. Ide*¹⁶ a similar statute¹⁷ was held to be for the benefit and protection of both the bank and its depositors, and creates a presumption in favor of survivorship when the joint deposit in form is payable to the survivor. Although the particular deposit in litigation did not meet the statutory

¹² N. Y. BANKING LAW, sec. 239(4) (Thompson, 1939).

¹³ 251 N. Y. 380, 167 N.E. 506 (1929).

¹⁴ In *Re Casseen*, 66 N. Y. S. 799 (1946).

¹⁵ *Paterson v. Comastri*, 244 P. 2d 902 (Cal. 1951) interpreting CAL. GEN. LAWS act 652 sec. 15a (Deering, 1944).

¹⁶ 335 Mich. 291, 55 N.W. 2d 835 (1952).

¹⁷ 3 MICH. COMP. LAWS sec. 487.703 (1948).

requirement, if it had, the court indicated, it could be rebutted by competent evidence. Under both the Michigan and New York statutes, the deposit during the lifetime of the depositors raises a presumption that a joint tenancy was created, but, this can be rebutted by competent evidence. It would seem that the only way to rebut this statutory presumption is by the introduction of oral or extrinsic evidence, and this conflict with the parol evidence rule creates confusion rather than eliminates it.

In the 1951 Minnesota case of *Park Enterprises, Inc. v. Trach*,¹⁸ where the account was held subject to garnishment for the individual debt of one of the depositors, the court, holding that the depositors were bound by the written agreement, said:

Since the type of ownership which the bank and its depositors have created by their contract defies classification under the traditional concepts of property ownership, we are forced to treat this case as presenting a contract question and must decide what the incidents of this type of ownership are primarily by reference to the terms of the contract creating it.¹⁹

And the court went on to say:

A joint bank account of this kind is a creature of contract between parties avowedly indifferent to the exact percentage of ownership between themselves. The law should take them at their word and give effect to their contract without making detailed and belated evidentiary inquiries to establish factual ownership. Any presumption, whether conclusive or rebuttable, that part or all of these joint accounts are immune from garnishment has the effect of either creating or tending to create a nonstatutory exemption for the parties using them, and any attempt to base the extent of garnishment upon the respective amounts of the account owned by each depositor will compel courts and juries to grope with problems which the depositors themselves have declared to be of no consequence. Let them abide the results which flow from their own declared purposes.²⁰

The court recognized that a contract was created which could not be varied by oral testimony, nor should it be since the parties have clearly expressed their intention. The statutes and the cases interpreting them in the different jurisdictions are in conflict on this point, and the result reached often is no more satisfactory than that reached under the gift

¹⁸ 223 Minn. 467, 47 N.W. 2d 194 (1951). Here both depositors contributed to the account; but for the position that it would have made no difference had only one contributed, see *Vesey v. Vesey*, 54 N.W. 2d 385 (Minn. 1952). In this case the surviving depositor killed the other depositor, the court would not allow the survivor to take the balance, not because she took from the estate of the deceased but because both depositors had a right to withdraw all of the account, and the survivor had prevented the deceased from exercising his right, so they would not let her profit from her wrong.

¹⁹ *Park Enterprises, Inc. v. Trach*, 223 Minn. 467 at —, 47 N.W. 2d 194 at 196 (1951).

²⁰ *Id.* at —, 47 N.W. 2d at 197.

theory. Surely the legislatures intend by their enactments to simplify rather than complicate the problem.

Conclusion

Under all three theories intention is a controlling factor and it would seem that the best theory is the one which affords the best opportunity to determine this intention accurately. Intention is primarily a question of fact, and the average person using the joint bank account probably intends to give his co-depositor a legal power to draw upon the account, and the legal right of survivorship. Since it is intended that the co-depositor should be able to demand payment from the bank, it is inconsistent with this intention to say that the depositor merely intended a testamentary disposition. It is also inconsistent with this intention to say that the depositor made the account for his own convenience, or to say that survivorship was intended but no right to make withdrawals during the life of the depositor was intended. It is not inconsistent with this intention to say that the beneficiary of the contract, or the donee of the gift, has the rights and interests provided for in the agreement.

It is submitted that the contract theory will lead to the proper result in the majority of cases, and should be followed, because in applying it the courts do not need to use the historical and sometimes confusing principles of gift intention. Nor are they confined to any prescribed statutory provision. They can look at the agreement, and base their decision on general contract principles. Under any of the theories, however, the desired result of giving effect to the true intentions of the parties will be reached if the written agreement or signature card is held to be conclusive. Holding the parties to the written manifestation of intention works no hardship on either of them, because if they intend otherwise, they can so express themselves to the bank in writing. Under any other rule there is great risk that virtually every joint deposit will result in litigation.

JAMES T. YOUNGBLOOD

MASTER AND SERVANT—THE SIMPLE TOOL DOCTRINE

In a recent North Dakota case, *Olson v. Kem Temple, Ancient Arabic Order of the Mystic Shrine*,¹ the plaintiff, a member of a fraternal organization, volunteered to assist in decorating a pavilion for the use of the organization and was injured when he fell from a loose

¹ 77 N. D. 365, 43 N.W. 2d 385 (1950).